prosecution never took any statement from them. If the defence wanted them it was the defence who must subpoena them and after all there is evidence that the accused did inform the defence counsel of their presence when the defence counsel visited him in the prison. In view of this, I do not hold any adverse inference under Section 114(g) of the evidence against the prosecution for not calling them. In any case it is settled that calling of witnesses is well within the prosecution's sole discretion.

At the end of the prosecution's case, I held that the defence evidence had not raised a reasonable doubt on the case for the prosecution and I found him guilty as charged of trafficking in cannabis which was more than 200 grammes (414.3 grammes).

As regards sentence I passed the only sentence that I could pass under the law which was that the accused be hanged until death.

Accused convicted and sentenced accordingly.

MATANG HOLDINGS BHD. & ORS. v. DATO LEE SAN CHOON & ORS.

[O.C.J. (Yusoff Mohamed J.) January 30, 1985]

[Johore Bahru – Civil Suit No. 2 of 1985]

Practice and Procedure – Application for appointment of a Receiver in the company – Guiding principles – Assets of the company in jeopardy – Mismanagement – Prayer for stay of execution of dissolution of injunction pending appeal to higher court – Plaintiff must show special circumstances.

Company Law – Annual general meeting – Opportunity for all members to assemble – No injunction to restrain such meeting.

In this case two groups of directors were on the Board. Both had filed suits against each other. One group applied to the Court for the following orders:

(1) To appoint a receiver for the compnay;

(2) An injunction to restrain the holding of Annual General Meeting;

(3) To stay execution of the order of dissolution of injunction pending appeal to the higher court.

Held: (1) for appointment of receiver the plaintiff must present a *prima facie* case and show that the property of the company is in jeopardy. The plaintiff has failed to prove both;

(2) an Annual General Meeting gives an opportunity to all members of the company to assemble and elect those directors whom they want. Injunction could not be granted in such a case;

(3) unless special grounds are shown, stay of execution of the order of dissolution of injunction cannot be granted.

Cases referred to:

(1) *Wong Kim Fatt* v. *Leong & Co. Sdn. Bhd.* [1975] 1 M.L.J. 20.

(2) *Serangoon Garden Estate Ltd.* v. *Ang Keng* [1953] M.L.J. 116.

(3) *Leong Poh Shee* v. *Ng Kat Chong* [1966] 1 M.L.J. 86.

(4) *Aab Singh* v. *Jeffrey Fernandez* [1971] 1 M.L.J. 139.

(5) *Shaw* v. *Holland* [1900] 2 Ch. 305, C.A

CIVIL SUIT.

Upali Masacorale for plaintiffs.

Chua Jui Leng for Defendants.

Cur. Adv. Vult.

Yusoff Mohamed J.: Arising out of Judgment delivered on January 16, 1985 in dissolving the injunction restraining the defendants from acting as directors in this case, the plaintiffs now applied for a series of three Orders:-

1) to appoint a receiver in order to protect and preserve their 1st plaintiffs' assets and interests;

2) an injunction to restrain the Annual General Meeting scheduled for the 3rd February 1985 and

3) for an Order to stay execution of the Order given on January 16, 1985 pending the outcome of the appeal to the Supreme Court;

The applications are supported by two affidavits. Both affidavits are affirmed by Dato Hee Ching @ Hei Wah and another dated January 19, 1985 as at enclosures (28) and (31) respectively.

1) *Appointment of Receiver;*

The affidavit at enclosure (28) among other things merely states that as the injunction the plaintiffs had obtained on January 2, 1985 was dissolved, it is imperative that a competent person be appointed by the Court to manage the affairs of the company generally, pending the trial of the aforesaid matters. The trial of the matters referred

to are the cases in Civil Suit No. 2/85 filed by the plaintiffs and Civil Suit No. 28/85 filed by the defendants. Both seek declarations which, by the plaintiffs that the Annual General Meeting held on December 29, 1984 as legal and valid and by the defendants that it is otherwise and therefore invalid.

The principles in granting such an application for the appointment of Receiver are as appeared in Order 30 Rule 1/6 of the Rules of the High Court 1980. (See *Mallal's* Supreme Court Practice, 2nd Ed. @ 380). The Court must be satisfied of the following:-

a) That there is a good *prima facie* claim of title by the plaintiffs:

b) that the property is in jeopardy or

c) that the applicants will be in a worse situation if the appointment of a Receiver is delayed.

In arguing this principle, Mr. Upali Masacorale, on behalf of the applicants, in his forceful persuasion says that though he has no evidence to show that the properties or assets of the company are in jeopardy or to show that there was mismanagement of the company, he contends that by the fact that the directors have wide ranging powers in the Articles and Memorandum of Association of the Company, these by itself would give rise to mismanagement of the company's assets or administration. He cited Justice Abdul Razak's judgment in *Wong Kim Fatt* v. *Leong & Co. Sdn. Bhd.*[1] as authority for his proposition.

In my view, it is speculative to say that the directors of the company would abuse their powers because of the wide powers given to them in the Articles and Memorandum of Association of the company without any further evidence to show that there was mismanagement or that there was jeopardy to the assets of the company.

Wong Kim Fatt's case is distinguished in that, there it was shown that the plaintiff's $50,000/- shares in the company was in peril when the company required that his shares be transferred to the defendant by virtue of the Articles of Association when Abdul Razak J. granted the injunction restraining the defendant from enforcing the provision of the Articles of Association in order to preserve the plaintiff's share.

None of this is shown by the plaintiffs in the present case except for further suggestion by the learned Counsel that because of the fact that the company would be holding its Annual General Meeting on February 3, 1985, it would jeopardize the positions of the plaintiffs. I do not accept this suggestion as good ground as some of the plaintiffs are also members of the current board of directors and are nominated for re-election on February 3, 1985's Annual General Meeting.

On these grounds, in my opinion, the application fails.

2) *An injunction to restrain the Annual General Meeting Scheduled for February 3, 1985:*

The ground stated in the applicants' affidavits at enclosure (31) specifies that if the meeting scheduled were to proceed, it would make the Civil Suit filed by the plaintiffs herein merely nugatory unless the restraining order of the defendants subsists.

The facts as deposed by the affidavits earlier showed that the Annual General Meeting scheduled for these dates was determined by the current Board of Directors on December 28, 1984 wherein some of the plaintiffs, 2nd, 3rd and 4th of the 2nd plaintiffs were present. The purported Annual General Meeting convened by the plaintiffs was held on December 29, 1984, the day after the board meeting.

The agenda for the Annual General Meeting to be held on February 3, 1985 as shown in affidavit in reply at enclosure (38) have been circulated to all the members. They include resolutions to the effect that the retiring directors including 2nd, 3rd and 4th of the 2nd plaintiffs would stand for re-election. These nominations of the plaintiffs have not been withdrawn. Similarly Mr. Tai Pek Seng, the other deponent in this application also filed his nomination papers for election as director of the company at this scheduled meetting.

Upon these facts, it does not seem to me that if the Annual General Meeting of February 3, 1985 were to proceed, it would render the Civil Suit herein nugatory as claimed by the plaintiffs. On the other hand, it would be doing substantial justice to all the shareholders for the opportunity to re-elect the plaintiffs as directors by the whole assembly of members of the company as opposed to the limited number of members present on December 19, 1984.

On the facts of this case, in my view, the

application for injunction also fails.

3) *For stay of execution of the Order of dissolution of injunction given on January 16, 1985:*

The principle in granting a stay of execution is that:-

"the Court will not deprive a successful party of the fruits of his litigation until an appeal is determined unless the unsuccessful party can show special circumstances to justify it." *Serangoon Garden Estate Ltd.* v. *Ang Keng*(3).

In *Leong Poh Shee* v. *Ng Kat Chong*(4) Raja Azlan Shah J. (as he then was) held that special circumstances must constitute something distinctive and out of the way.

The only ground given in applicants' affidavit for stay of execution is that the plaintiffs have filed an appeal to the Supreme Court against the order of January 16, 1985.

An appeal is not such ground as constitute special circumstances unless there are merits in the appeal – see *Serangoon Garden Estate's* case (*ibid*).

In *Aab Singh* v. *Jeffrey Fernandez*(5) Yong J. referring to *Shaw* v. *Holland*(5) quotes:–

"the proceedings under a judgment should not be stayed pending an appeal unless on special grounds."

There are no special grounds in this application except the appeal pending the merits of which have been discussed above.

In my view, the application should be dismissed.

All the three applications by the plaintiffs are therefore dismissed with costs.

Application dismissed.

Solicitors : *Jackson & Masacorale; Chua Brothers, Azzat & Xavier.*

INDRAN & ANOR. v. PUBLIC PROSECUTOR

[R.Cr.J. (Peh Swee Chin J.) February 15, 1985]

[Seremban – Petition for Criminal Revision No. 7 of 1984]

Criminal Law and Procedure – Preliminary inquiry – Nature and quantum of evidence to enable Magistrate to commit an accused person for trial – Confession of co-accused – Evidence Act 1950, s. 30 – Criminal Procedure Code (F.M.S. Cap. 6), ss. 139, 140 & 141.

In this case the applicants had been committed for trial on a charge of murder. The only evidence implicating the applicants came from the respective cautioned statements of two other persons accused in the same case. It was argued that the cautioned statements were exculpating to the makers and did not amount to confessions and section 30 of the Evidence Act was not applicable. Even if they were confessions and section 30 of the Evidence Act applied, it was argued that they could only be considered against the applicants and that there was no *prima facie* case against the applicants to be committed for trial. The prosecution submitted that the cautioned statements would form part of the prosecution case and the weight of such evidence would be for the jury and not the committing Magistrate to consider. An appeal by the applicants was dismissed on the ground that the said order of committal was not appealable. The applicants applied for revision.

Held: (1) if at the preliminary inquiry there is credible evidence, which if believed but subject to all possible lines of defence may end in a conviction, the inquiring Magistrate has no option but to commit the accused person for trial;

(2) the evidence of the cautioned statement of the other two accused in this case, is credible evidence which if believed and subject to all possible lines of defence, including one of frailty of such evidence may result in a conviction. The order for committal must therefore be confirmed;

(3) an inquiring Magistrate does not determine guilt or innocence and the expression "sufficient grounds for committing the accused for trial" does not denote a case proved beyond a reasonable doubt.

Cases referred to:-

(1) *Public Prosecutor* v. *Nordin bin Johan* [1983] 2 M.L.J. 221.
(2) *Lim Yow Choon* v. *Public Prosecutor* [1972] 1 M.L.J. 205.
(3) *In re Pang Poh Pah* [1985] 2 M.L.J. 214.
(4) *Re Osman bin Abdullah* [1954] M.L.J. 237.
(5) *Soo Sing & Ors.* v. *Public Prosecutor* [1951] M.L.J. 143.
(6) *Tan Ah Ting* v. *Public Prosecutor* [1974] 2 M.L.J. 37.
(7) *Haw Tua Tau* v. *Public Prosecutor* [1981] 2 M.L.J. 49.

PETITION FOR CRIMINAL REVISION.

J. Nadchatiram for the applicants.